SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Textbooks

IN THE

Supreme Court of the United States

October Term, 1972
No. 71-1422

MURRAY KAPLAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITIONER'S REPLY BRIEF.

Preliminary Statement.

1. Respondent asserts, erroneously, that the book in question is "admittedly obscene" (Resp. Br., 20, 25). In fact, petitioner claims that the book is not obscene and is unconditionally protected by the First and Fourteenth Amendments because it is legally indistinguishable from other books afforded such protection by the Court (Pet. Br., 56-58). Petitioner also claims that, under the "variable obscenity" concept, the book herein is not obscene because it was sold to a consenting adult (Pet. Br., 26-58). It is true that in Point I, petitioner assumed, *arguendo*, that the book was obscene. Nevertheless, petitioner claims that a consenting adult has a fundamental personal right, a right of privacy flowing from the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitu-

tion, to read the book, and that petitioner, a bookseller, has standing to assert that right. It is therefore inaccurate to state, as respondent does, that the book, *Suite 69*, is "admittedly obscene".

2. Respondent asserts that the record shows only that petitioner sold a "book to a police officer who did not state why he wanted to buy it"; that the officer went there because of complaints from the public; and that "the record is otherwise barren of any evidence (including any prosecution stipulation) that petitioner neither thrust his wares on an unwilling public nor sold them to minors" (Resp. Br., 20-21).

The "complaints from the public" consisted of a letter from the office of one of the Councilmen of the Los Angeles City Council, addressed to the Chief of Police of Los Angeles and then forwarded to a division of the Los Angeles Police Department. The nature of the complaint was never determined. [A. 40].[1]

The record reflects that the police officer came to petitioner's store because Administrative Vice was checking on different locations "known as adult-type book stores" [A. 45]. At the time, there were approximately 250 such adult book stores in the City of Los Angeles [A. 58]. There were of course additional such stores in the County of Los Angeles [A. 58], the State of California [A. 200-202], and the Nation [*Report of the*

[1]The officer testified, over objection that it was hearsay, that he had spoken to other police officers and that there were "only about three or four [complaints] that we talked about" [A. 43-44]. The period of time covered by the complaints, and the nature thereof, were not revealed in the record.

Commission on Obscenity and Pornography (U.S. Govt. Printing Office, 1970), 100-102, 128-130].[2]

The record reflects that the sale in question was solely to a consenting adult and did not implicate minors or invade the privacy of the general public. Before trial, petitioner moved to dismiss the complaint on the ground that California Penal Code §311.2 "is no longer a valid law to prosecute under" where there is dissemination of books, magazines and films "to consenting adults and where there's no claim, as there is no claim here, that there is a dissemination to minors; that under the authority of . . . *Stanley v. Georgia* . . . such a prosecution is not viable because any form of expression does enjoy First Amendment protection unless the specific problems indicated earlier are present, *i.e.*, a dissemination to minors or an intrusion into the privacy of the public, neither of which is present in this case". [A. 10]. Respondent replied that *Stanley* "is limited . . . to the specific facts of private possession in one's own home" and does not "make any other distinction" concerning minors or thrusting upon an unwilling audience [A. 10]. Following argument as to the reach of *Stanley* [A. 11-13], the trial judge stated:

> "It's the Court's opinion that the thrust of the defense motion goes to the ultimate facts that may be developed at trial which the court is not prepared to rule on at the present time. Under good

[2] "The profile of a patron of adult stores that emerges from . . . observations in different parts of the United States is: white, middle-aged, middle-class, married, male, dressed in business suit or near casual attire, shopping alone". [*Commission Report*, 129].

pleading practices, it's not necessary that facts be pled. From the language of the complaint . . . the language would certainly permit the People to —that is, the framework of the presentation would permit the People to prove that such material was being offered to adults, that it might constitute an assault on privacy, and that the general public would include minors as well." [R. 13-14].

Thereafter petitioner's counsel interjected, stating that he thought that respondent would stipulate that respondent did not "intend to prove dissemination to minors nor . . . assault on the general public by public display" [A. 14]. Respondent agreed that it intended to prove that petitioner distributed the book "to an adult" [A. 14]. When petitioner's counsel inquired whether respondent's stipulation "is that there is no attempt or claim to prove that there was a dissemination to minors or a public display to the general public in any fashion", respondent agreed tentatively, saying, however, "I have to check. There may be a fact with regard to an unwilling party". [A. 14]. The record discloses that in fact there was no "unwilling party" involved.

The book was sold to a police officer with 16½ years of police experience. He was plainly an adult and could not have been less than 35 years of age. After the policeman was browsing in the store for approximately 30-40 minutes, the following exchange occurred between him and the petitioner:

"[PETITIONER]: This is not a library. Can I help you?

"[POLICE OFFICER]: Yeah, do you have any sexy books?

"[PETITIONER]: All of our books are sexy. . . .

"[POLICE OFFICER]: Well, how about some paperback books, you know? Do you have any real good ones?

"[PETITIONER]: Hey, I'm reading one right now, and it's called *Suite 69*." [A. 54-55].

After petitioner read the policeman a portion of the book, he purchased it for $1.95 [A. 55].

When respondent offered the book in evidence, petitioner objected to its introduction on the ground, *inter alia*, that petitioner's sale to a consenting adult was protected by the Constitution, as interpreted by *Stanley*, "whether or not the material is obscene. That's based on the principle that the First Amendment protects the dissemination of any [publication], including obscenity, to adults." [A. 61]. Respondent replied that *Stanley* is "narrowly limited to private possession in one's home" [A. 61].

It is thus clear that the uncontradicted record (including the prosecution stipulation) reveals that petitioner was convicted solely for selling the book to a consenting adult who asked for a "good sexy book". There is nothing in the record to suggest that there was any sale to minors, or any thrusting of sexually explicit publications upon an unwilling public.

This Reply Brief deals solely with Points I and II of respondent's Brief.

I.

An Adult Has a Fundamental Personal Right to Read or View Anything He Chooses. The State May Not Interfere With This Right by Punishing a Bookseller for Selling a Book to a Consenting Adult, in the Absence of Evidence in the Record of a Subordinating State Interest Which Is Compelling.

Respondent concedes that the right of a person "to be free from government thought control may be absolute", but argues that such a right "does not protect others who stimulate his thoughts. . . ." (Resp. Br., 27). Respondent is in error, it is respectfully submitted, in its assertion that petitioner, a bookseller, has no right "to stimulate thoughts" or to assert the right of an adult to have his thoughts stimulated. See, *e.g.*, *Griswold v. Connecticut*, 381 U.S. 479; *Eisenstadt v. Baird*, 405 U.S. 438; *Lovell v. Griffin*, 303 U.S. 444; *Thornhill v. Alabama*, 310 U.S. 88.

A. It is now clear that the right of a person "to be free from government thought control" stands as a bar to the State interfering with the right of an adult to read or view whatever he chooses. In *Stanley v. Georgia*, 394 U.S. 557, the Court protected two vital interests: freedom of mind and thought, and privacy of one's home. After stating that the freedoms of speech and press "necessarily protect the right to receive" and that this right to receive information and ideas, "regardless of their social worth . . . is fundamental to our free society", the Court went on to state that this right "takes on added dimension" because the State had invaded of their social worth . . . is fundamental to our free the privacy of Stanley's home [394 U.S. at 564]. Mr. Justice Marshall quoted with approval the now famous

words of Justice Brandeis, dissenting in *Olmstead v. United States*, 227 U.S. 438, 478:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man."[8]

If the First Amendment means anything, Mr. Justice Marshall stated, it means that a State has no business telling a man "what books he may read or what films he may watch" [394 U.S. at 565]. Justice Marshall cited with approval the opinion of Judge Herbert, "dissenting" in *State v. Mapp*, 170 Ohio St. 427, 166 N.E.2d 387 (1960). Judge Herbert is quoted as follows:

> "I cannot agree that mere private possession of * * * [obscene] literature by an adult would constitute a crime. The right of the individual to read, to believe, or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library

[8] In *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 1038, n. 10, the Court stated that *Stanley* emphasized that the Constitution protects the fundamental right to be free, "except in very limited circumstances, from unwanted governmental intrusions into one's privacy." Reference was then made to Mr. Justice Brandeis' above mentioned statement.

> seems to the writer to be a clear infringement of his constitutional rights as an individual." [394 U.S. at 562, n.7].

In the case at bar, petitioner invokes the "right to read", a constitutional right of privary afforded in *Stanley* and recognized in *United States v. Reidel,* 402 U.S. 351. In *Reidel,* Mr. Justice White, speaking for the Court, said:

> "The right Stanley asserted was 'the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home.' 394 U.S., at 565, 89 S.Ct. at 1248. The Court's response was that 'a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.' . . . ." [402 U.S. at 355-356].

Mr. Justice White then stated that "[t]he focus of this language was on freedom of mind and thought. . . . The personal constitutional rights of those like *Stanley* to possess and read obscenity in their homes and their freedom of mind and thought do not depend on whether the materials are obscene or whether obscenity is constitutionally protected. Their rights to have and view that material in private are independently saved by the Constitution." [402 U.S. at 356]. Mr. Justice Harlan, concurring, stated that the "constitutionally protected interest in the *Stanley* situation which restricts governmental efforts to proscribe obscenity is the First Amendment right of the individual to be free from governmental programs of thought control, however such pro-

grams might be justified in terms of permissible objectives" [402 U.S. at 359]. For Justice Harlan, *"Stanley* rests on the proposition that freedom from governmental manipulation of the content of a man's mind necessitates a ban on punishment for the mere possession of the memorabilia of a man's thoughts and dreams, unless that punishment can be related to a state interest of a stronger nature than the simple desire to proscribe obscenity as such" [402 U.S. at 359]. *Stanley* recognizes, he said, "a right to a protective zone insuring the freedom of a man's inner life, be it rich or sordid" [402 U.S. at 360]. Justice Harlan then cited *West Virginia State Bd. of Ed. v. Barnette,* 319 U.S. 624, 642, where the Court said that the State is without constitutional power to invade "the sphere of intellect and spirit which it is the purpose of our First Amendment to the Constitution to preserve from all official control". Mr. Justice Marshall, concurring in *United States v. Reidel,* and dissenting in *United States v. 37 Photographs,* 402 U.S. 351, 360, said that *Stanley* "unequivocally rejected the outlandish notion that the State may police the thoughts of its citizenry."

In *Mapp v. Ohio,* 367 U.S. 643, 672, Mr. Justice Stewart, bypassing the search and seizure issue, voted to reverse the judgment therein because he was persuaded that the statute (prohibiting the possession of obscene material) upon which the petitioner's conviction was based was "not consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment". A similar view was expressed by the California Supreme Court in *In re Klor,* 64 Cal.2d 816, 415 P.2d 791, 51 Cal.Rptr. 903 (1966). The Court there held that the State may not, constitutionally, make it a crime to write, paint or draw

an obscene work, saying: "Such a statute would approach an interdiction of individual expression in violation of the First and Fourteenth Amendments." [51 Cal.Rptr. at 906].

In *Griswold v. Connecticut*, 381 U.S. 479, the Court said that the "State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read" [381 U.S. at 482]. In *Cohen v. California*, 403 U.S. 15, Mr. Justice Harlan stated that "[w]holly neutral futilities * * * come under the protection of free speech as fully as do Keats' poems or Donne's sermons. . . ." [403 U.S. at 25]. After stating that "words are often chosen as much for their emotive as their cognitive force", Justice Harlan warned against outlawing particular words, saying:

> ". . . Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results." [403 U.S. at 26].

See also, *Gooding v. Wilson*, 405 U.S. 518; *Rosenfeld v. New Jersey*, ... U.S. ....., 92 S.Ct. 2479 (1972).

In *Rosenfeld*, the Court vacated a judgment of conviction and remanded the case for reconsideration in the light of *Cohen v. California*, 403 U.S. 15, and *Gooding v. Wilson*, 405 U.S. 518. Mr. Justice Powell (joined by the Chief Justice and Mr. Justice Blackmun) dissented, saying that there are abundant op-

portunities for persons, who derive satisfaction from vocabularies depending upon obscenities, to gratify their tastes, but that such gratification must be private, without subjecting an unwilling audience to such experience. As Justice Powell put it, "our free society must be flexible enough to tolerate [filth and obscenities] provided it occurs without subjecting unwilling audiences to . . . verbal abuses. . . ." [92 S.Ct. at 2483].

In *Rosenfeld*, appellant was convicted for using the adjective "M - - - - - F - - - - -" on four occasions to describe various school officials while addressing a public school board meeting attended by about 150 people, approximately 40 of which were children and about 25 of which were women. The dissenters felt that the exception to First Amendment protection recognized in *Chaplinsky v. New Hampshire*, 315 U.S. 568, "extends to the wilful use of scurrilous language calculated to offend the sensibilities of *an unwilling audience*" [92 S.Ct. at 2484]. (Emphasis added). Mr. Justice Powell cited with approval *Williams v. District Court*, 136 U.S. App.D.C. 56, 419 F.2d 638 (1969), where it was stated that "[t]he fact that a person may constitutionally indulge his taste for obscenities in private does not mean that he is free to intrude them upon the attentions of others".

B. Petitioner, a bookseller, has standing to assert the right of an adult to read a book of his choice, including an obscene book. In *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, the Court addressed itself to Baird's "standing to assert the rights of unmarried persons" denied access to contraceptives [92 S.Ct. at 1033]. After stating that Baird had sufficient interest to satisfy the "Case or Controversy" requirement of Article III of the Constitution, the Court held that

Baird had standing because "the relationship between Baird and those whose rights he seeks to assert is not simply that between a distributor and potential distributees, but that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so". The Court found that if Baird were denied standing, the fundamental personal rights involved in that case would be violated or adversely affected. The Court emphasized the need to relax its rule "against the assertion of third-party rights" to protect the important interests at stake. Observing that enforcement of the Massachusetts statute would materially impair the ability of single persons to obtain contraceptives, the Court stated that Baird's standing to assert third-party rights was stronger than the claim made in *Griswold* "because unmarried persons denied access to contraceptives in Massachusetts, unlike the users of contraceptives in Connecticut, are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights." [92 S.Ct. at 1034]. Petitioner herein has even a stronger claim than did Baird to assert "third-party rights". Like Baird, petitioner "is now in a position, and plainly has an adequate incentive" to assert the right to read. Moreover, petitioner was convicted for engaging in "pure" communication. *Cf. Cohen v. California,* 403 U.S. 15 with *United States v. O'Brien,* 39 U.S. 367. [W]e deal here with a conviction resting solely upon 'speech', . . . not upon any separately identifiable conduct. . . ." *Cohen v. California,* 403 U.S. at 18. In *Lovell v. Griffin,* 303 U.S. 444, 452, Chief Justice Hughes stated that "[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion". He then emphasized that distribution is

as essential to freedom of press as is publication. Without such distribution, publication would be of little value. *Ex Parte Jackson*, 96 U.S. 727, 733. Petitioner herein has standing, *inter alia*, because to deny such standing "would have an intolerable inhibitory effect on freedom of speech". *Eisenstadt v. Baird*, 92 S.Ct. at 1034, n.5.

C. Petitioner, in claiming standing to assert the right of an adult to read what he chooses, does not challenge the ruling in *Roth v. United States*, 354 U.S. 476, that obscenity may be regulated by the States. In this case, petitioner seeks no blanket immunization to deal with "obscenity" in any way he likes. Petitioner recognizes that *Roth* and its progeny hold that obscenity is not "speech",[4] protected by the First and Fourteenth Amendments, and may be controlled by the State. But where, as here, an adult has the right to receive and read a book, the power of the State to interfere with this right, by punishing the bookseller, is limited. State regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. *N.A.A.C.P. v. Alabama*, 377 U.S. 288, 307. As Mr. Justice White stated in

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[4]Judge Irving Kaufman, after observing that the Court held in *Roth* that obscenity is not speech, stated:

> "If obscenity is not speech then what is it? I would not be giving away a big secret to state that efforts to make *that* determination have not been remarkably successful up until now. I am certainly not attempting to have any fun at the Supreme Court's expense. I cannot myself offer anything of value toward formulating that inconceivably difficult definition. . . . Given the complexity of both communication and people, such a definition—of obscenity—may be beyond the power of discursive language."

(11 Annual James Madison Lecture, New York Law Journal, April 1, 1970). [Emphasis in original].

Griswold v. Connecticut, 381 U.S. 479, 503-504, when a State seeks to interfere with fundamental personal rights, it "bears a substantial burden of justification when attacked under the Fourteenth Amendment. . . . 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' "

In *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, the Court, relying on the Equal Protection Clause, expanded the right to "use" contraceptives, protected by the right of marital privacy, to cover the right to distribute contraceptives to an unmarried woman.

> "If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. . . ." [92 S.Ct. at 1038]. [Emphasis in original].

Mr. Justice White, with whom Mr. Justice Blackmun concurred, assumed that the statute could have been constitutionally applied if there were a sufficient showing in the record of a compelling state interest. Mr. Justice White stated: "Had Baird distributed a supply of the so-called 'pill,' I would sustain his conviction

under this statute. . . . Baird, however, was found guilty of giving away vaginal foam. Inquiring into the validity of this conviction does not come to an end merely because some contraceptives are harmful and their distribution may be restricted. . . ." Where the restriction burdens fundamental personal rights, "we may not accept on faith the State's classification of a particular contraceptive as dangerous to health. Due regard for protecting constitutional rights requires that the record contain evidence that a restriction on distribution of vaginal foam is essential to achieve the statutory purpose, or the relevant facts concerning the product must be such as to fall within the range of judicial notice." [92 S.Ct. at 1043]. Since neither requirement was met, Justice White joined the majority. "[T]o sanction a medical restriction upon distribution of a contraceptive not proved hazardous to health would impair the exercise of the constitutional right. . . . [A] conviction cannot stand where the 'record fail(s) to prove that the conviction was not founded upon a theory which could not constitutionally support the verdict.' . . ." [92 S.Ct. at 1044].

Stanley set forth the legitimate state interests in controlling the distribution of obscenity: distribution to minors, or the thrusting of the material upon an unwilling public. Neither of those conditions exist in the case at bar. The record establishes conclusively that the sale herein was solely to a consenting adult. It follows, it is respectfully submitted, that the State may not interfere with the right of the adult to read or view what he chooses by punishing petitioner herein, a bookseller, for selling a book under conditions which do not trench upon any legitimate state interests.

II.

Respondent Has Failed to Establish a Compelling Reason, or Even a Rational Basis, for Interfering With the Fundamental Right of an Adult to Read or View Whatever He Chooses.

A. Petitioner argued that a book has a different impact, "varying according to the part of the community it reached", and "depending upon the setting in which it is placed" (Pet. Br., 28). Petitioner further argued that where, as here, a book is sold to a consenting adult, not a minor's and is not thrust upon an unwilling audience, the book is not obscene, although it might be obscene if sold to minors or thrust upon an unwilling audience (Pet. Br., 36-53).

Respondent addressed itself only peripherally to this argument. Respondent's basic argument (Resp. Br., Point II) is that "state regulation is proper and necessary" even when "obscene" publications are "sold to an adult instead of to a child, or forced on an unwilling adult" (Resp. Br., 28). Petitioner here addresses himself to respondent's argument that the State is free to interfere with an adult's "right to read" provided it acts rationally.[8]

B. Respondent cites *Ginsberg v. New York*, 390 U.S. 629, to support its assertion that "merely because a state may bar distribution to children of books deemed suitable for adults does not mean, as petitioner contends, that the state may not reasonably restrict the sale of obscene matter by virtue of the fact that the sales are not to children" (Resp. Br., 28-29). While the meaning of this statement is not clear, respondent

[8]This Point, as briefed by respondent and answered by petitioner, is intimately linked with the argument presented in Point I.

seems to argue that the State may constitutionally bar an adult from receiving an "obscene" publication if it acts rationally. *Ginsberg* did hold that a state statute that barred minors from receiving publications which are obscene on the basis of their appeal to minors had a rational relation to the objective of safeguarding such minors and was not unconstitutional. The Court held that New York could accord minors "a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see". The Court could not say "that the statute invades the area of freedom of expression constitutionally secured to minors". [390 U.S. at 637]. Relying on *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, the Court stated that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic to the structure of our society" [390 U.S. at 639]. The Court held that since "obscenity is not protected expression and may be suppressed without a showing of the circumstances which lie behind the phrase 'clear and present danger' in its application to protected speech", state power "requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors" [390 U.S. at 641].

In the case at bar, we are dealing with the rights of adults to read, not with the rights of minors. As Mr. Justice Stewart suggested in his concurring opinion in *Ginsberg*, a minor does not have the same "right to read" as an adult. The First Amendment, he said, secures "the liberty of each man to decide for himself what he will read and to what he will listen. The Constitution guarantees, in short, a society of free

choice." [390 U.S. at 649]. Justice Stewart was of the view that minors were "not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a state may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults." [390 U.S. at 650].

It is one thing to say, as the Court did in *Ginsberg*, that the State may prohibit the sale of an "obscene" publication to a minor, upon a showing of "reasonableness", but quite another thing to say that an adult's "right to read" may be denied on a similar showing. The adult's right to read stands on a higher footing and may only be denied by a clear showing that there is a compelling state interest justifying such denial. In the case at bar, the State made no such showing. Indeed, the State has not even made out a case that it is "reasonable" to interfere with the adult's right to read what he chooses.

Respondent argues that it is "reasonable" to interfere with the right of an adult to read "obscenity", because "legalizing distribution to adults would certainly cause an increase in juvenile possession through redistribution. Respondent does . . . say . . . that allowing free and easy distribution to adults would of necessity result in less protection from exposure to juveniles." (Resp. Br., 36).

Respondent's argument, in effect, calls for the overruling of *Butler v. Michigan*, 352 U.S. 380. In *Butler*, the Court unanimously struck down a Michigan obscenity law that made it an offense for a bookseller "to make available for the general reading public . . .

a book . . . found to have a potentially deleterious influence upon youth" [352 U.S. at 382-383]. In *Butler*, as in the case at bar, the book was in fact sold to a police officer. Michigan argued, as respondent does in the case at bar, that it was "reasonable" to quarantine "the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence. . . ." [352 U.S. at 383].

In striking down the Michigan statute, Mr. Justice Frankfurter stated:

> "We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society. . . ." [352 U.S. at 383-384].

In *Stanley*, the Court rejected the State's argument "that prohibiting of possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution". The Court stated that it was not convinced that such difficulties exist, "but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases." [394 U.S. at 567-568].

Respondent also argues that petitioner should not be "trusted to sell to minors and not to intrude on the public" (Resp. Br., 37). Of course, petitioner never argued that he should be "trusted not to sell to minors or

to intrude on the public". Petitioner did argue that he, and other booksellers, could be reached by the criminal law if there were a sale to minors or an intrusion on the public [Pet. Br., 53-55]. If the State alleges in its accusatory pleading, and proves, that petitioner sold an "obscene" book to a minor or thrust such a book upon an unwilling public, the State is free to punish petitioner. See, *United States v. Vuitch,* 402 U.S. 62. On the other hand, the State may not constitutionally punish petitioner for selling a book to a consenting adult because respondent speculates that petitioner may in the future sell a similar book to "a child, or . . . peddle . . . door-to-door" (Resp. Br., 28). Fundamental constitutional rights may not be denied upon such flights of fancy.

Respondent "wonders" if freedom of speech protects the sale of sexually explicit matter "from newspaper vending machines up and down the sidewalks" (Resp. Br., 37), although petitioner had made no argument in favor of such sales on sidewalks. Finally, respondent says, without further explanation, that "petitioner is playing with a loaded gun" (Resp. Br., 38). If respondent means that the right of freedom of speech and press protected by the First Amendment is "dangerous", the simple answer is that that fact was known to our Founding Fathers, who chose to accept that danger rather than accept tyranny. If respondent means by its statement that petitioner's sale of an "obscene" book to a consenting adult is a threat to the Republic, respondent has failed to make its case. The threat to the Republic comes not from the petitioner but from lawless conduct of law enforcement officials enforcing "thought control" laws. See, *e.g., Dyson v. Stein,* 401 U.S. 200; *Aday v. Municipal Court,* 210 Cal.App.2d

229, 26 Cal.Rptr. 576 (1962); *Cinema Classics Ltd. v. Busch*, 339 F.Supp. 43 (1972).

In *Dyson v. Stein*, 401 U.S. 200, 204, Mr. Justice Douglas graphically describes two nighttime obscenity raids as "search-and-destroy missions in the Vietnamese sense of the phrase". After stating that it would be difficult to find in our books a more lawless search-and-destroy raid, Mr. Justice Douglas stated:

> ". . . If this search-and-destroy technique can be employed against this Dallas newspaper, then it can be done to the New York Times, the Washington Post, the Seattle Post Intelligencer, the Yakima Herald-Republic, the Sacramento Bee, and all the rest of our newspapers. . . ." [401 U.S. at 206].

In *Aday v. Municipal Court*, 210 Cal.App.2d 229, 26 Cal.Rptr. 576 (1962), Los Angeles law enforcement officials seized, under the California obscenity law, some 400,000 books. After condemning the seizure as a flat and flagrant violation of constitutional rights, by those sworn to uphold the law, the Court said:

> ". . . [W]e are required to remember that when government itself becomes lawbreaker the foundations of our freedoms are weakened, and unless official oppressors are restrained those foundations may completely collapse." [26 Cal.Rptr. at 589].

Eight months ago, a three-judge statutory Federal Court was called upon to make a similar pronouncement after finding that local law enforcement officials had, in the name of enforcing the obscenity laws, engaged in raids and seizures "for the twin purposes of

putting petitioners out of business and censoring and preventing the circulation of great quantities of sexually oriented, pictorial materials". *Cinema Classics Ltd. v. Busch*, 339 F.Supp. 43 (1972). After finding that the indiscriminate seizure of over 15,000 reels of motion picture films and the indiscriminate seizure of business records amounted to "harassment" and "bad faith" law enforcement, in violation of rights secured by the Federal Constitution, the court said:

> "The censor and the illegal police raiding party are even less welcome in this country than the peddler of execrable sex materials, and with good cause. If such activity as appears in the instant case is not promptly rebuked and redressed, who will call an eventual halt, and where will it be called, when the civil liberties of all the citizens become more and more eroded in the name of 'decency?' " [339 F.Supp. at 51].

Within the last two (2) months, the District Attorney of the County of Los Angeles dusted off California's 60-year-old Red Light Abatement Law to close down a publishing company and two companies distributing books and magazines. The building, consisting of approximately 115,000 sq. ft., was padlocked, and more than three million (3,000,000) books and magazines were impounded, on the theory that the publishing activities made the premises a house of prostitution. *People and Busch v. American Art Enterprises, Inc. etc. et al.*, Superior Court of the State of California in and for the County of Los Angeles, No. C-37091.[6] The lawless conduct just recounted, engaged

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[6]As the article in the September 26, 1972 issue of the Van Nuys News reveals (see Appendix A), California appellate courts frustrated this attempt to suppress "obscenity" by violating consti-

in "in the name of decency", is, it is respectfully submitted, a threat to the rule of law itself. Perhaps such infringements were inevitable once the Court opened the door "the slightest crack". *Roth v. United States*, 354 U.S. 476, 488. In *Smith v. California*, 361 U.S. 147, 160, the Court warned that "illegitimate and unconstitutional practices bet their first footing" when the attack is made on some thing or person deemed "obnoxious". It is the duty of courts. Mr. Justice Black stated, "to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon". Justice Black returned to the same theme, dissenting in *United States v. 37 Photographs* and *United States v. Reidel*, 402 U.S. 363, 388. He there warned against "bowing to popular passions" and to what appears to be "the temper of the times", saying:

> ". . . In any society there come times when the public is seized with fear and the importance of basic freedoms is easily forgotten. . . ."[7]

More recently, the Chief Justice of the California Supreme Court felt called upon to make a similar observation. Wright, "The Role of the Judiciary: From Marbury to Anderson", 60 Calif.L.Rev. 1262, 1267-1268 (September 1972).

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tutional rights. *American Art Enterprises, etc., et al. v. Superior Court*, Court of Appeal of the State of California, Second Appellate District, 2d Civ. No. 40950.

[7]"Every time an obscenity case is to be argued here, my office is flooded with letters and postal cards urging me to protect the community or the Nation by striking down the publication. The messages are often identical even down to commas and semicolons. The inference is irresistible that they are all copied from a school or church blackboard. Dozens of postal cards often are mailed from the same precinct. The drives are incessant and the pressures are great. Happily we do not bow to them. . . ." *Memoirs v. Massachusetts*, 383 U.S. 413, 427-428 (Mr. Justice Douglas concurring).

It is not yet time to recognize that "obscenity" is speech, entitled to First Amendment protection, it surely is time to put an end to the "witch hunts" conducted in the name of enforcing the obscenity laws.[8] Petitioner respectfully suggests that recognizing an adult's "right to read", and a bookseller's standing to enforce that right, will go a long way towards solving the "obscenity problem". Such recognition offers the best hope that the door barring federal and state intrusion into the area of freedoms of speech and press will be kept "tightly closed". *Roth v. United States*, 354 U.S. 476, 488.

Conclusion.

The judgment of the court below should be reversed.

Respectfully submitted,

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SAM ROSENWEIN,
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[8]In *United States v. Klaw*, 350 F.2d 155, 170, the Court emphasized the need, as this Court did in *Roth*, for tight appellate controls in obscenity cases. "Unless there be this protection, a witch hunt might well come to pass which would make the Salem tragedy fade into obscurity." The Court recognized how easy it was for a prosecutor "to stand before a jury, display the exhibits involved, and merely ask in summation: 'Would you want your son or daughter to see or read this stuff?' A conviction in every instance would be virtually assured." See also, *United States v. Vuitch*, 402 U.S. 62, 79-80 (Mr. Justice Douglas, dissenting).

APPENDIX A.

The News.

HIGH COURT REJECTS BUSCH ANTI-PORNOGRAPHY ACTION

Refusal to Hear Case Means 3 Million Books Now Can Be Released for Sale

Three million alleged pornographic books now can be removed from a Chatsworth building as the result of the State Supreme Court's refusal yesterday to hold a hearing in the matter.

The books are part of a civil law suit filed by Dist. Atty. Joseph B. Busch against 30 defendants under the California Red Light Abatement Act.

One of the principal defendants in the suit is Milton Luros, whom Busch has described as the "biggest pornography publisher in Southern California."

Previous Ruling

Busch's office was notified yesterday afternoon by the clerk of the Supreme Court in San Francisco that justices had denied the prosecution's request for the hearing.

The denial allows an appellate court ruling releasing the books to stand and the books could have been removed at any time after 5 p.m. yesterday.

The appellate court, which ruled last week, stayed its own order until 5 p.m. yesterday to allow Busch to appeal to the State Supreme Court.

According to Dep. Dist. Atty. Donald Kaplan, the refusal of the Supreme Court to hold a hearing means the books are no longer under court jurisdiction and can be removed by the defendants if they choose to do so.

Injunction Previously

Busch contends the location where the books are stored—21300 Lassen St.—is the headquarters for acts of prostitution which occur elsewhere and which are photographed for inclusion in some of the books.

Superior Court Judge Robert A. Wenke last Sept. 11 issued a preliminary injunction which among other things barred removal of the books from the Lassen St. premises.

Last week, the Appellate Court stayed the injunction, except for a portion which prohibits any lewd or unlawful acts being conducted on or from the premises.

On the same day the first stay was issued, the same Appellate Court granted Busch until 5 p.m. yesterday to challenge the ruling.

"Will Be Circulated"

Stanley Fleishman, one of the attorneys for the defendants, hailed the Supreme Court's action in denying a hearing.

Concerning what will be done with books, Fleishman said:

"They will be circulated as they have in the past—lawfully throughout the nation. They are not obscene by standards announced by the U.S. Supreme Court and a California Supreme Court in countless cases."

The attorneys said that from the beginning he had contended the District Attorney was engaged in an illegal attempt to censor the press."

Cites Constitution

He noted that six months ago a Federal Court ruled that the District Attorney "was engaged in bad faith law enforcement in his attempt to suppress books and magazines which were protected by the free speech and press provisions of the constitution.

According to Fleishman, the California Supreme Court's ruling, "reminds us again that the Constitution is for all people and not just for those who may be popular at a particular time. The Constitution protects the unpopular just as surely as it protects the popular."